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Public Prosecutor v Mohd Razali bin Zakariya

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05(LB)-12–01 OF 2016
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
27 DECEMBER 2017

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Appeal by prosecution — Offence of trafficking drugs — Whether trial judge correct in acquitting and discharge — Whether accused set up by police — Whether accused's defence probable — Whether afterthought — Dangerous Drugs Act 1952 s 39B(1)(a)

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Acting upon information that a certain drug trafficking activity would take place, police officer SP4 met his informer who then contacted the respondent ('the accused'). SP4 spoke to the accused using the informer's mobile phone. During the telephone conversation, it was agreed that the accused was to sell 9kg of cannabis to SP4 at the price of RM17,100 and they were to meet at Giant Hypermarket the following day. When SP4 arrived at the said place the next day, he was introduced to the accused by the informer. The accused told SP4 to wait at the parking area and left the restaurant. When he returned an hour later, the accused brought with him a box ('exh P11') on top of his motorcycle basket. He instructed SP4 to follow him. The accused came out from the parking area, followed by SP4 in his car and the two stopped at an area not far from Giant Hypermarket. The accused showed the contents of exh P11 to SP4. After seeing several packets of compressed substances suspected to be cannabis, SP4 signalled his team of police. The police sprung into action and managed to apprehend the accused. The substances in exh P11 were confirmed to be 8,676.9g of cannabis. The accused was charged for trafficking drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Satisfied that the prosecution had established a prima facie case against the accused, the trial judge ordered the accused to enter his defence. In his defence, the accused denied that exh P11 and its contents were his. According to him one Along could have set him up because he had scolded the latter for asking to look for a drug supplier a week before he was arrested. The trial judge found that Along was not a fictitious character and the accused's defence was supported by credible witnesses. The accused was acquitted and discharged. Hence the present appeal. The issues that arose were whether the trial judge erred when His Lordship: (a) found that Along was a real person and not a fictitious character and Along had cast a reasonable doubt on the prosecution's case; (b) considered and accepted the testimonies of the defence's witnesses

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A when it was apparent that they were interested witnesses; and (c) found that the accused could have been set up by Along when there was no evidence suggesting the same nor any motive shown.

Held, allowing the appeal:

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(1) The character of Along and the role played by him was never disclosed to the police soon after the accused's arrest and the discovery of the drugs. The accused could and should have informed the police of the existence of Along if indeed Along existed. The period immediately after his arrest C would provide the most opportune moment for the accused to tell his version of the event. However, the accused had chosen to disclose the existence of Along and the role played by him only years later in court. The belated disclosure was an afterthought (see paras 58–59).

D (2) SP4 and SP5 were total strangers in relation to the accused. It had not been shown that they crossed path in the past. It had also not been shown that they had an axe to grind against the accused to propel them to manufacture evidence and testify adversely against the accused in a capital offence. There was also nothing inherently improbable in their testimonies. The testimonies of SP4 and SP5 were grounded upon the E abundance of evidence that there was an agreement for the sale of drugs between the accused and SP4 in which the accused failed to dislodged. The evidence of SP4 and SP5 was squarely in sync with the probabilities of the case (see paras 76 & 90).

F (3) The order of the High Court discharging and acquitting the accused of the offence was set aside and substituted with a finding of his guilt and his conviction of the offence. The accused was sentenced to death (see para 92).

G **[Bahasa Malaysia summary**

Bertindak atas maklumat bahawa satu aktiviti pengedaran dadah akan dijalankan, pegawai polis SP4 bertemu dengan pemberi maklumat yang kemudian menghubungi responden ('tertuduh'). SP4 bercakap dengan tertuduh menggunakan telefon bimbit pemberi maklumat. Semasa H percakapan telefon, dipersetujui bahawa tertuduh hendaklah menjual 9kg kanabis kepada SP4 pada harga RM17,100 dan mereka akan bertemu di Pasar Raya Giant keesokan harinya. Apabila SP4 tiba di tempat tersebut esoknya, dia diperkenalkan kepada tertuduh oleh pemberi maklumat. Tertuduh menyuruh SP4 menunggu di kawasan tempat letak kereta dan meninggalkan restoran. I Apabila dia kembali sejam kemudian, tertuduh membawa bersama-samanya satu kotak ('eksh P11') di atas bakul motosikalnya. Dia menyuruh SP4 mengikutnya. Tertuduh keluar dari kawasan tempat letak kereta, diikuti oleh SP4 yang memandu keretanya dan kedua-dua mereka berhenti di kawasan yang tidak jauh dari Pasar Raya Giant. Tertuduh menunjukkan kandungan

eksh P11 kepada AP4. Selepas melihat beberapa paket berisi bahan mampat yang disyaki kanabis, SP4 memberi isyarat kepada pasukan polisnya. Polis bertindak dan berjaya menahan tertuduh. Bahan-bahan dalam eksh P11 kemudian disahkan sebagai 8,676.9g kanabis. Tertuduh dipertuduh bagi pengedaran dadah, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati bahawa pihak pendakwaan berjaya membuktikan kes prima facie terhadap tertuduh, hakim bicara memerintahkan tertuduh membela diri. Dalam pembelaannya, tertuduh menafikan bahawa eksh P11 dan kandungannya adalah miliknya. Menurut tertuduh, seorang bernama Along telah memerangkapnya kerana dia telah memarahi Along kerana menyuruhnya mencari pembekal dadah seminggu sebelum dia ditahan. Hakim bicara mendapati Along bukan watak rekaan dan pembelaan tertuduh disokong saksi-saksi yang boleh dipercayai. Tertuduh dilepaskan dan dibebaskan. Oleh itu rayuan ini. Isu-isu yang timbul adalah sama ada hakim bicara terkhilah apabila beliau: (a) mendapati Along adalah orang yang wujud dan bukan watak rekaan dan Along telah membangkitkan keraguan munasabah terhadap kes pendakwaan; (b) mempertimbangkan dan menerima testimoni saksi-saksi pembelaan dan jelas bahawa mereka adalah saksi-saksi berkepentingan; dan (c) mendapati bahawa tertuduh mungkin telah diperangkap oleh Along kerana tiada keterangan yang mencadangkan ini mahupun motif ditunjukkan.

Diputuskan, membenarkan rayuan:

(1) Watak Along dan peranan yang dimainkan olehnya tidak didedahkan kepada pihak polis sebagik sahaja tertuduh ditahan dan penemuan dadah. Tertuduh boleh dan sepatutnya memaklumkan pihak polis akan kewujudan Along jika benar Along wujud. Tempoh sejuruh selepas penahanannya memberi peluang buat tertuduh untuk memperihalkan versinya tentang peristiwa yang berlaku. Walau bagaimanapun, tertuduh memilih untuk mendedahkan kewujudan Along dan peranan yang dia mainkan selepas bertahun lamanya di mahkamah. Pendedahan lewat ini adalah satu fikiran semula (lihat perenggan 58–59).

(2) SP4 dan SP5 adalah orang asing sama sekali buat tertuduh. Tidak dibuktikan bahawa mereka pernah bertemu sebelum ini. Tidak dibuktikan bahawa mereka berdendam dengan tertuduh untuk mereka keterangan dan memberi keterangan bertentangan terhadap tertuduh dalam satu kesalahan hukum bunuh. Tiada apa-apa juga yang sangat tidak mungkin dalam keterangan mereka. Keterangan SP4 dan SP5 berasaskan banyak keterangan bahawa terdapat persetujuan bagi jualan dadah antara tertuduh dan SP4 yang mana tertuduh gagal sangkal. Keterangan SP4 dan SP5 sangat selaras dengan kemungkinan kes ini (lihat perenggan 76 & 90).

(3) Perintah Mahkamah Tinggi melepaskan dan membebaskan tertuduh

daripada pertuduhan diketepikan dan diganti dengan dapatan kebersalahannya dan sabitannya terhadap pertuduhan. Tertuduh dijatuhkan hukuman mati (lihat perenggan 92).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Balasingham v PP [1959] 1 MLJ 193 (refd)
Kumaran a/l Sappani v PP [2012] 6 MLJ 153, FC (refd)
Lim Boon San v PP [1968] 2 MLJ 45 (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
Rasmi bin Yusof v PP [2013] 5 MLJ 66, CA (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141; [2010] 4 CLJ 529, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B, 40A

Muhammad Azmi bin Mashud (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Rahmatullah bin Baharudeen (Rahamat & Mashuri) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below, the appellant was charged as follows:

> Bahawa kamu pada 20hb Januari 2014, jam lebih kurang 10.45 malam, di tepi Jalan Kg Sg Pasir, Sungai Petani, di dalam Daerah Kuala Muda, di dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya cannabis seberat 8676.9 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the defence's case, the respondent was acquitted and discharged of the aforesaid offence.

[3] The appeal before us by the public prosecutor was in respect of the said acquittal and discharge.

[4] We allowed the said appeal after due consideration of the issues raised and the submissions made in support thereof and set aside the order of acquittal and discharge made by the learned trial judge and substituted it with an order convicting the respondent of the offence and henceforth sentenced the respondent to suffer the death penalty by hanging.

[5] We now give our grounds.

THE CASE FOR THE PROSECUTION

[6] On 19 January 2014, SP4 (L/Corpl Mohd Aznawi Fariz bin Miskom, of BSJN, IPK, Kedah) received information of a suspect believed to be involved in drug trafficking activities in Sungai Petani. He conveyed the information to his superior, SP5 (ASP Abdul Razak bin Osman, Pegawai Turus Risikan/Operasi/Tahan, JSJN, IPK, Kedah).

[7] SP4 was then instructed by SP5 to get further information of the suspect.

[8] SP4 met his informer on the same day (19 January 2014), who then contacted the suspect. SP4 then spoke with the suspect using the informer's handphone.

[9] In the telephone conversation, the suspect introduced himself as 'Li' while SP4 introduced himself as 'Boy'.

[10] SP4 convinced the suspect to sell to him 9kg of cannabis. The agreed purchase price for the whole amount was RM17,100. The suspect further agreed to meet SP4 at Giant Hypermarket, Sungai Petani, the following day pursuant to the said sale.

[11] On 20 January 2014, SP4 briefed SP5 of his dealing and agreement with the suspect. At about 5pm, SP5 proceeded to organise a further briefing with his officers to nab the suspect. SP4 was instructed to act as an agent provocateur ('AP') to buy the said drugs. SP4 was also given RM17,100 as flash money by SP5. In addition SP4 was instructed to ignite his lighter as a signal to the raiding party to act once he could confirm that the suspect has the drugs with him.

[12] SP4 arrived at the Giant Hypermarket at around 8.30pm. He saw his informer who was already there. They proceeded to the KFC Restaurant, located in the premises. A short while later the suspect arrived. He came alone.

A **[13]** SP4 was introduced to the suspect by the informer who then went away and sat at a table nearby.

[14] SP4 unequivocally identified the respondent/accused as the said suspect. Equally, SP4 firmly stated that the respondent had come alone in the said first ever meeting with him.

[15] SP4 said that they spoke for about ten to 15 minutes, where in the course of their conversation, SP4 had wanted to show the flash money to the respondent but the respondent had refused to see it.

[16] The respondent left the restaurant at about 8.45pm on a motorcycle bearing the No PHX 7289 ('exh P22'). Before leaving the respondent told SP4 to wait at the parking area for his return.

[17] SP4 proceeded to the parking area and waited in his car for the respondent to return. He informed SP5 of the outcome of his meeting with the respondent. SP5 then instructed a member of his team, one Zakariah, to get into SP4's motorcar to assist SP4.

[18] The respondent returned about an hour later. SP4 saw him having a paper box ('exh P11') on top of his motorcycle basket. The respondent approached SP4 and then instructed SP4 to follow him.

[19] The respondent came out from the parking area, followed by SP4 in his car, and drove towards Jalan Kampong Sungei Pasir, not far from Giant Hypermarket. The respondent pulled over at the side of the said road. SP4 also stopped his car behind the respondent's motorcycle.

[20] SP4 alighted from his car and went up to the respondent who was still seated astride on his motorcycle. The respondent showed the contents of the paper box exhs P11 to SP4. SP4 saw several packets of compact substances inside the paper box. He checked the packets and found that it contained compressed plant materials suspected to be cannabis.

[21] SP4 then ignited his lighter. SP5 and his officers moved in and managed to arrest the respondent while the respondent was still astride on his motorcycle. SP5 said that there was a brief struggle between his officers and the respondent when they tried to apprehend the respondent.

[22] After the respondent's arrest, SP5 searched and seized the paper box ('exh P11') which was still on the respondent's motorcycle and found it

contained nine packets of compressed plant materials wrapped in tin foil papers and plastics, suspected to be cannabis. A

[23] The respondent and the incriminating exhibits were brought back to IPD, Kuala Muda. At about 1am, the respondent was handed to one Insp Tan Cheng Yee, and was taken to his house for a further search of incriminating drugs. However, no drugs were found at the respondent's house. SP5 though was not involved in this search. B

[24] SP5 finally handed over the respondent and the seized items to the investigating officer, SP6 (Insp Mohd Zulhafiz bin Zainuddin), on 21 January 2014, who later had the incriminating exhibits sent to the chemist, SP2 (Faesmazianna bt Napiah). C

[25] The chemist found the nine packages (exhs P12 to P21) to contain 8676.9g of cannabis ('the said drugs') as defined under s 2 of the Dangerous Drugs Act 1952 ('the DDA'). SP2 also prepared a report of her analysis, exh P10, evinced at p 335, *Jld* 4, *rekod rayuan* ('RR'). D

[26] The learned trial judge was satisfied that the prosecution had established a prima facie case against the respondent upon the charge preferred and hence, ordered the respondent to enter his defence. E

THE CASE FOR THE DEFENCE F

[27] The respondent gave evidence on oath.

[28] The respondent testified that prior to the year 2009, he was running a food stall business with his family in Simpang Taman Satria, Jalan Langgar, Alor Setar, Kedah. G

[29] He met a lot of people in the course of running his food stall, one of whom was 'Along' whom he had known in 2000 or 2001. He knew Along was involved in drug trafficking activities and had even invited him to join in the trade on several occasions. H

[30] In 2009, he left the family food business when he got an offer to work as a general worker at Bakar Arang Health Clinic, Sungai Petani. Consequently he moved his family to Sungai Petani. In 2013, he purchased a house in Taman Semarak, also in Sungai Petani, and yet again had his family moved into the new house. I

A **[31]** The respondent further testified that a week before he was arrested on 20 January 2014, Along had been calling and texting messages to him, seeking his help to look for someone who could supply drugs. Along told him that he was no longer involved in supplying drugs and was seeking the respondent's help to get someone who could supply drugs.

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[32] The respondent said that he had then informed Along that he could not help because he did not use drugs and did know anyone who could supply drugs. However, Along was very persistent and had continuously sought his assistance by sending three or four messages a day.

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[33] On 19 January 2014, Along called the respondent at around 8–9pm, whereupon the respondent proceeded to tell Along that there was a supplier but had imposed a condition that he (Along himself) must come and discuss with the supplier personally.

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[34] The respondent informed Along that the supplier is Pak Ca who was then staying in Kampong Sungai Pasir, Sungai Petani, Kedah. He said he managed to contact Pak Ca through his friend, Sobri, and was told by Pak Ca that the price of 1kg of cannabis was RM1,900.

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[35] Along asked the respondent the price quoted by Pak Ca. Along also told the respondent that he would go to Pak Ca's place the next day. In addition, Along also said that he wanted to meet him (respondent) the next day (20 January 2014) at KFC Restaurant in Kampung Sungai Pasir, Sungai Petani, at around 8–9pm.

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[36] The respondent continued that on 20 January 2014, he went home after he had finished work at 5pm. His good wife went to work at around 7.45pm to 8pm. He sent his daughter (SD2, Nurel Aisyah bt Mohd Razali) for religious classes also at about the same time. While waiting for his daughter's class to end, he received a call from Along who told him that he (Along) had arrived at the KFC Restaurant at Giant Hypermarket.

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[37] After her daughter's religious class had ended, the respondent went to meet Along at KFC Restaurant on a motorcycle. He took along her daughter who was 11 years old at the material time.

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[38] The respondent testified that at the restaurant he saw Along with his friend, whom Along introduced to him as 'Boy' (in the defence narrative 'Boy' was SP4).

[39] The respondent sat next to Along while Boy was seated a distance away. The respondent said that he did not speak to Boy. Along informed him that Boy had wanted to buy drugs. He told Along that the price was RM1,900 per kg and the drugs were with Pak Ca. The respondent agreed to lead the way to Pak Ca's place.

[40] They left the restaurant, leaving Boy behind. Boy was told to wait at the restaurant for Along's return. The respondent was the rider, Along was the pillion rider and the respondent's daughter was seated in front. They went to the respondent's house to send the daughter home before going to Pak Ca's place.

[41] When they reached the respondent's house, the respondent's friend, SD4 (Mohd Azhar bin Hashim), had just arrived as well. SD4 came with his nephew and had wanted to borrow a nebulizer from the respondent. The respondent said that he had always kept a nebulizer at home because his daughter was suffering from asthma.

[42] The respondent and Along left for Pak Ca's place about half an hour later. SD4 and his nephew had decided to leave too at the same time.

[43] Midway to Pak Ca's place, Along requested the respondent to go back to the restaurant to get Boy to come along to meet Pak Ca.

[44] When they reached the Giant Hypermarket parking area, Along waved at Boy instructing him to follow them in his car.

[45] They exited the parking area and went in the direction of Kampong Sungai Pasir. Then Along instructed the respondent to stop at the road side because he had wanted to make a call to his friend.

[46] Along got off from the motorcycle. He started talking on his mobile phone and slowly walked away from the respondent. The respondent was still on his motorcycle with the engine running.

[47] A car pulled over at the back of his motorcycle. A man dashed out from the car and went straight to him and pulled him away from his motorcycle until he fell off. A second car came. Three or four men alighted from the second car and pinned the respondent on the ground and had the respondent handcuffed. They identified themselves as police officers.

[48] The respondent stated that while he was pinned down, he saw Along running away towards the junction to Kampong Sungai Pasir. The police did

not go after Along. At the same time he saw a policeman going to a tree nearby and took out a box, exh P11. The policeman found the said incriminating drugs inside the box exh P11. The respondent claimed that he was shocked at the discovery.

[49] The respondent and the incriminating exhibits were later brought to IPD, Kuala Muda. The incriminating drugs were taken out of the box exh P11 and placed on the table before the respondent.

[50] The respondent denied that the box exh P11 and the incriminating drugs inside the said box were his. The respondent also denied that he was trafficking in drugs. The respondent claimed that Along could have set him up because he had scolded Along for asking him to look for a drug supplier a week before he was arrested.

[51] At the end of the defence's case, the learned trial judge found that 'Along' was not a fictitious character but a real person in the defence's narrative. In addition SD2, SD3 and SD4 were credible witnesses, corroborating the appellant's evidence regarding the existence of Along and that the respondent could have been set up by Along because the respondent had scolded Along earlier for asking him to look for a drug supplier. The defence's narrative in totality had cast a reasonable doubt upon the prosecution's case, particularly with regard to the inducement of this character, Along. The prosecution had failed to discharge its heavy responsibility to disprove the defence's story vis a vis to disprove the purported facts in the defence's narrative. Hence, the respondent was discharged and acquitted of the charge preferred against him.

THE APPEAL

[52] The learned deputy public prosecutor ('DPP') for the appellant submitted that:

(a) the learned trial judge was in error when he found that Along is a real person and not a fictitious character and the inducement of Along had cast a reasonable doubt upon the prosecution's case;

(b) the learned trial judge erred when he had considered and had accepted the testimonies of the defence's witnesses when it is apparent that they are interested witnesses; and

(c) the learned trial judge was in error when he found that the respondent could have been set up by Along when there was no evidence suggesting the same nor any motive shown.

OUR DECISION

Ground (i) and (iii) — The existence of Along and the set up to entrap the respondent

[53] The learned trial judge found that the respondent's narrative suggested that he was being framed for the offence charged and the culprit was the character in the defence's narrative, Along. After a lengthy discourse, the learned trial judge was convinced that the character of Along was not fictitious, but a real character in the defence's narrative.

[54] The learned DPP thus contended that the finding of the learned trial judge that Along is a real person was without basis. It was further contended that the presence of Along and the role played by him was an afterthought and a recent invention on account that the respondent did not disclose the same to SP5, the arresting officer, at the earliest available opportunity. In fact the character Along was never disclosed to SP5 until the cross-examination of SP5 during the trial.

[55] The learned DPP also submitted that Along's character was also not made known to the investigating officer, SP6. There were questions put to SP6 though that the respondent had disclosed the presence of Along but the same were, however, denied by SP6.

[56] Hence, it was submitted that the respondent had failed to give notice of his defence ie the existence of Along and the role played by him at the first available opportunity to account for the horrible mess he is presently in.

[57] It is our considered view that in all the circumstances of this case, the first opportunity to give notice of the respondent's defence in respect of the existence of Along must occur at the point soon after his arrest and the discovery of the said drugs — see *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46 at pp 61–62; [2009] 3 CLJ 733 at pp 749–750; *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585. Otherwise, it is absolutely an afterthought where the weight to be accorded therein is a matter in which the court has little option but to dismiss it with little or no weight to warrant due consideration.

[58] We have tooth combed the evidence of SP5 and were in full agreement with the learned DPP that the character of Along and the role played by him was never disclosed to SP5 soonafter the respondent's arrest and the discovery of the drugs thereafter. The respondent could have and should have informed SP5, of the existence of Along if indeed Along did exist. All the more so when, by the defence's own narrative, Along had played a very profound role in the

scheme of events from the very beginning until the final minutes before the arrest of the respondent and the seizure of the said drugs were effected.

[59] The period immediately after his arrest would provide the most opportune moment for the respondent to tell his version of the event as SP5 was the first officer to have accosted him with the drugs. However, the respondent had chosen to disclose the existence of Along and the role played by him to SP5 only years later in court. We have no doubt at all that such disclosure was a belated disclosure suggesting that it was an afterthought. The respondent has all the time in the world to concoct his story to suit with the crux of his defence. It is not the product of spontaneity and it is not the first reaction of the respondent in response to his arrest. Hence, the chance of embellishment and improvement in the challenge cannot be ruled out.

[60] Even if we agree with the suggestion of the defence that the respondent had disclosed the existence of Along to the investigating officer, SP6, in the course of SP6's investigation, we were of the considered view that such disclosure is equally a belated disclosure and worst still, no specific details of Along was given to enable SP6 to mount an effective investigation. The evidence indicated that the respondent did not give the specific date and time of such disclosure to SP6. Hence, we reckoned that it must have occurred after the respondent was handed over to SP6 by SP5 in the early hours following the day after his arrest. In a nutshell it must have been several hours or days after his arrest.

[61] Be that as it may, it is of no assistance to the cause of the defence. In *Teng Howe Sing v Public Prosecutor*, the Federal Court hence decided that:

> [30] ... The learned trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law. On this point we would like to refer to the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p 591 said that:
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> > ... So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.
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> [31] In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[62] The respondent before us was caught on all fours in the same conundrum as the accused in the case cited above. There is no reason for the respondent to withhold the information relating to the existence of Along at the time of his arrest from SP5. As found in the authority cited above, the want of disclosure of Along at the earliest available opportunity goes some way to support the testimonies of SP4 and SP5 that Along did not exist at all in the scheme of events and that at all material times the respondent was alone in his dealing with SP4 and on the day in question he had come alone with the said drugs to be transacted to SP4.

[63] At pp 148–149, *Jld* 2, *RR*, the respondent stated:

S: Adakah kamu tahu barang kes dadah di dalam kotak itu milik siapa?

J: Mungkin Along ingin memerangkap saya kerana sebelum ini saya ada perselisihan faham sebab saya pernah marah Along sebab bertanyakan kes dadah. Berkenaan pembekal dalam seminggu sebelum tangkapan.

S: Itu anggapan kamu?

J: Mungkin juga sebab dia lihat kesenangan saya sebab saya ada rumah, kereta dan isteri. Ini anggapan saya.

[64] The Federal Court in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141 at pp 152–153; [2010] 4 CLJ 529 at pp 543–544 had reiterated the principles applicable in relation to entrapment:

> [26] ... In our view, the common law position that entrapment is not a substantive defence remains the law, The position taken by the High Court in *Kang Ho Juan* where it was pronounced that there is no place in Malaysian law to allow the so called defence of entrapment, is still good law here.
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> [27] In any event, it is for the appellant to prove that he committed this offence as a result of an entrapment. This can only be determined from the facts to be evaluated by the trial court. In other words it is a question of fact. As there was no finding of facts on this issue by the trial court the issue of entrapment as a defence does not arise in this case. On this point alone, it demolishes the first argument raised by learned counsel for the appellant. For the defence to operate at all, the appellant needed to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed this offence. The facts however show that the appellant was a person with an opposite disposition; ie that of an 'unwary criminal' who readily participated in this offence. In this case, at worst, SP3's action can only be described as soliciting the appellant to supply the drugs. There was no entrapment as such.

[65] We have scrutinised the evidence and found nothing to suggest that the respondent had discharged the burden of proving that he had committed the offence as a result of entrapment. The excuse that there was a misunderstanding

between him and Along because he had scolded Along earlier for asking him to look for a drug supplier or that Along was envious of him because he was leading a comfortable life with a wife, house and motorcar is too trivial and remote to propel Along to take such drastic measures to entrap the respondent to commit a capital offence.

[66] In addition, it makes no complete sense for the respondent to continue offering his services to Along until the final minutes before he was arrested by SP5 if he feel very strongly against Along's request to look for a drug supplier. The logical thing for him to do is to completely ignore Along. The facts indicate that the respondent readily entertained SP4's request to buy drugs from him. The respondent is an 'unwary criminal' who readily participated in the commission of this offence.

Ground (ii) — The acceptance of the testimonies of the defence witnesses by the trial judge

[67] The testimony of the respondent was diametrically opposed to that of SP4 and SP5. As seen in the earlier paragraphs of this judgement the testimony of the respondent was replete with the omnipresent of Along who was depicted as the principal player in the drug transaction between him (the respondent) and Along and not between him and SP4. He had never spoken to nor have had any dealing with SP4. The testimonies of SD2 and SD4 verily corroborated the respondent's evidence of the presence or existence of Along. Meanwhile SD (Mohd Shaiful bin Zakariya, the younger brother of the respondent) testified that he had received a telephone call from Along informing him that the respondent has been arrested by the police and SD was told to do the needful to assist the respondent.

[68] The learned trial judge found SD2, SD and SD4 to be credible witnesses and had indeed accepted their testimonies on the existence of Along.

[69] On the other hand, SP4's testimony singularly incriminates only the respondent. It was his testimony that at all times his dealing was only with the respondent and at all times the respondent had acted alone ie from his first telephone call to the respondent up to the moment he met the respondent in his first meeting at KFC Restaurant right until the delivery of the said drugs and the arrest of the respondent as narrated in paras 6–21 above. SP4 reiterated that the respondent did not bring his daughter along in the meeting with him at the KFC Restaurant. SP4 also denied that his informer's name is Along and denied the presence of Along and the role played by him at any point of time.

[70] SP5's testimony ran in tandem with the evidence of SP4. He saw the respondent coming alone to meet SP4 at KFC Restaurant. He saw the

respondent sitting together with SP4 at the same table and talking. He saw the respondent leaving the restaurant alone. He saw the respondent coming back alone to the parking area about an hour later with a paper box on the top of his motorcycle basket. He saw the respondent leaving the parking area alone on his motorcycle going towards Jalan Kampung Sungai Pasir followed by SP4 in his car. He saw the respondent being alone when he stopped his motorcycle by the roadside along Jalan Kampung Sungai Pasir. He saw SP4 inspecting the contents of the paper box together with the respondent and he saw SP4 igniting his lighter after the inspection. And, when he ambushed the respondent, the respondent was sitting alone astride his motorcycle.

[71] The learned DPP complained that in the light of the uncontroverted evidence of SP4 and SP5, it is wrong for the learned trial judge to have accepted the testimonies of SD2, SD and SD4 pertaining to the existence of Along without regard that these witnesses are interested witnesses on account that SD2 is the respondent's daughter, SD is his younger brother and SD4 was his friend. It raised issues of credibility and their evidence ought to be rejected for want of credibility. The learned DPP concluded that in all the circumstances of the case, the witnesses called by the respondent were not credible witnesses.

[72] The law on interested witnesses is plain that, to quote from the judgment in *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reason for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances. While the authorities also suggest that the evidence of interested witnesses must be treated with caution, there is no rule of law requiring the trial judge to caution himself and make a specific ruling or finding on the credibility of such witnesses — see *Rasmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66; *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45; *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153.

[73] The evidence of the interested witnesses will thus be assessed and weighed like that of any other witnesses and be subjected to the vagaries of cross-examination to test their veracity. Whether the testimony of the witnesses should be rejected in whole or in part will depend on the outcome of the cross-examination. And, it is the business of the trial judge to make a finding on the veracity of the witnesses and whether to reject their evidence in whole or in part at the end of the trial, having seen and heard them.

[74] Be that as it may, as noted earlier the evidence of the respondent and his witnesses were diametrically opposed to that of SP4 and SP5. Apparently it raised issues of credibility and the learned trial judge preferred the testimonies

of the former rather than the latter. However, the learned trial judge did not assign any reason for his preference in rejecting the testimonies of the latter.

[75] In dealing with issues of credibility, it is always necessary to take into consideration the tests that a trier of fact should ordinarily apply when evaluating oral evidence. One of them is motive. The presence or absence of motive on the part of a witness is a relevant consideration which a trial court should take into account.

[76] It is apparent that both SP4 and SP5 are total strangers in relation to the respondent. It has not been shown that they have crossed path in the past. It has also not been shown that they have an axe to grind against the respondent to propel them to manufacture evidence and testify adversely against the respondent in a capital offence. In addition, it is true that SP4 was an AP and SP5 was part of the grand design in an undercover sting operation. But the testimony of an AP, by reason of s 40A of the DDA is not to be presumed unworthy of credit by reason only of his having attempted to abet or abetted the commission of any offence by any person under s 39B if the attempt to abet or the abetment was for the sole purpose of securing evidence against such person, as was the case here (see also *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* at para 15, p 149 (MLJ); p 539 (CLJ) and paras 31–33, p 154 (MLJ); pp 544–545 (CLJ). There is also nothing inherently improbable in the testimonies of both SP4 and SP5. Equally, there is also nothing in the evidence to suggest that SP4 and SP5 had harboured an oblique motive to fix the respondent in the commission of a capital offence. It is thus apparent that the testimonies of SP4 and SP5 were grounded upon the abundance of evidence that there was an agreement for the sale of drugs between the respondent and SP4, in which the respondent had failed to dislodged, which the court cannot simply ignore.

[77] Another material consideration when evaluating oral evidence are the probabilities of the case. If the testimony of the witness is improbable, then the trial court should not hesitate to reject his evidence or according it very little weight. But where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection on the part of the trial court to give little or no weight on grounds of credibility — see *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257.

[78] SP4, the principal witness for the prosecution stated in very clear terms of his first meeting with the respondent on 20 January 2014 at KFC Restaurant, where the respondent had come alone, unaccompanied by any other person. The respondent confirmed that there was such a meeting at KFC Restaurant where he met SP4 albeit with several divergence as indicated in the

previous paragraphs. However, what is important here is the fact such a meeting did actually take place between the two of them consistent with the testimony of SP4 that he had called and had in fact spoken with the respondent a day earlier (on 19 January 2014) using his informer's mobile telephone, where in the said telephone conversation, both of them had agreed that:

(a) SP4 is to buy about kilograms of cannabis from the respondent;

(b) the purchase price for the 9kg of cannabis is RM17,100; and

(c) the two of them had agreed to meet at Giant Hypermarket the next day (20 January 2014) to finalise the deal and take delivery of the drugs.

[79] In addition, SP4 had with him the purchase money amounting to RM17,100 and had offered to show it to the respondent but the latter had declined to see it at that moment. The said sum of RM17,100 is consistent with the price quoted by the respondent for 9kg of cannabis. It is also consistent with SP5's evidence that he was told by SP4 of his agreement to buy 9kg of cannabis at RM17,100 for the whole amount from the respondent and that he had raised the said sum through contributions from his fellow officers, rank and file. The said sum amounting to RM17,100 brought by SP4 to the meeting at KFC Restaurant is also consistent with the agreement by the respondent to deliver the said drugs on the day in issue.

[80] SP5 saw the respondent leaving the said restaurant on a motorcycle and later saw SP4 seated in his car at the parking area of Giant Hypermarket. This is consistent with the evidence of SP4 that he was told by the respondent to wait for him at the parking area whilst he went elsewhere momentarily.

[81] SP4 said that about one hour later, the respondent came back to where he was waiting for him as instructed earlier. Now he came with a paper box on the basket of his motorcycle. SP5 also saw the respondent coming back to where SP4 was waiting with a paper box on the basket of his motorcycle. This is again consistent with SP4's testimony that the respondent had told him to wait for his return at the parking area.

[82] SP5 saw the respondent exiting the parking area and moving towards Jalan Kampong Sungai Pasir, followed by SP4 in his car. This is consistent with SP4's testimony that he was told by the respondent to follow him (respondent) in his car.

[83] Midway along Jalan Kampong Sungai Pasir, the respondent stopped his motorcycle by the roadside, followed by SP4, whereby SP4 was then invited to examine the contents of the paper box. SP4 confirmed that the several packages inside the paper box contained compressed plant material suspected to be

A cannabis and ignited his lighter. This confirmed the prosecution's case that there was a sale and purchase agreement between SP4 and the respondent, whereby SP4 had agreed to purchase the said drugs from the respondent and the respondent had agreed to sell the same to SP4. The respondent had delivered his side of the bargain by delivering the said drugs to SP4.

B

[84] SP5 saw the respondent stopping his motorcycle by the roadside and soon after saw SP4 nosed around the paper box and later igniting his lighter. He rushed in and effected the arrest of the respondent and seizure of the drugs. Again this is consistent and in fact confirmed SP4's testimony that there was C such a sale and purchase agreement between the respondent and SP4, and the respondent was performing the tail-end of the bargain by delivering the said drugs to SP4.

[85] In addition, SD2 was 11 years old at the time she gave her testimony on D 18 October 2015. She was only slightly more than nine years old at this time of the respondent's (her father) arrest on 20 January 2014. She gave an unsworn testimony. Obviously her veracity cannot be tested against the vagaries of cross-examination and hence, earned little weightage.

E

[86] In the meantime, SD (the respondent's younger brother) jumped into the fray out of nowhere to state that at about 12am on 21 January 2014, he had received a telephone call from Along informing him that the respondent had been arrested by the police and he was also told to do the needful to assist the F respondent.

[87] In our view, SD's evidence did little to assist the defence as it did not run in tandem with the respondent's stated defence that he was set up by Along in the commission of the offence because he had scolded Along earlier for asking G him to look for a drug supplier. It is unimaginable that Along would inform SD of the respondent's arrest if Along had all along wanted to set up or fix the respondent.

[88] In so far as SD4's evidence is concerned, he appeared to be at the right H place at the right time. He had arrived at the respondent's house with his nephew to borrow the respondents nebulizer just as the respondent had just arrived together with her daughter and Along. SD4 also left the respondent's house at about the same time when the respondent left his house with Along. In our view, SD4's evidence appeared fraught with coincidences rendering it to I be less than believable. In addition, a nebulizer is for personal use and not meant to be pass around to be used by all and sundry.

[89] In all the circumstances of the case, we opined that the evidence of SP4 and SP5 accords well and was squarely in sync with the probabilities of the case.

The uncontroverted factual evidence enumerated above goes a long way to support the testimonies of SP4 and SP5 that there was indeed a drug transaction exclusively between SP4 and the respondent without the involvement of a third party (Along). Clearly, the respondent was arrested with the said drugs after he had delivered his side of the bargain ie delivering the said drugs to SP4 as mutually agreed upon.

CONCLUSION

[90] We are very mindful that factual findings are primarily the domain of the trial judge who had all the advantage of seeing and hearing the witnesses testifying before him. However, an appeal is merely a continuation of proceedings by way of rehearing and the appellate court is entitled to make its own findings if the findings of the trial court is plainly perversed, unsustainable and not supported by the evidence adduced, as here before us.

[91] Hence we allowed the appeal by the honourable public prosecutor. The order of the High Court discharging and acquitting the respondent of the offence preferred against him at the end of the defence's case is set aside and substituted with a finding of his guilt and his conviction of the offence thereof. Consequently the respondent is sentenced to death by hanging according to law.

Order accordingly.

Reported by Afiq Mohamad Noor